APPENDIX A.

1. Pertinent Provisions of the California Constitution and Statutes Relating to the Assessment of Local Ad Valorem Taxes.

ARTICLE XIII, SECTION 2, CALIFORNIA CONSTITUTION.

2. Land, and the improvements thereon, shall be separately assessed. Cultivated and uncultivated land, of the same quality, and similarly situated, shall be assessed at the same value.

ARTICLE XIII, SECTION 10, CALIFORNIA CONSTITUTION.

10. All property, except as otherwise in this Constitution provided, shall be assessed in the county, city, city and county, town or township, or district in which it is situated, in the manner prescribed by law.

DIV. 1, PART 2, CHAP. 3, ART. 6 OF THE CALIFORNIA REVENUE AND TAXATION CODE ENTITLED "ASSESSMENT ROLL."

Section 601. The assessor shall prepare an assessment roll, as directed by the board, in which shall be listed all property within the county which it is the assessor's duty to assess.

Section 602. This local roll shall show:

(a) The name and address, if known, of the assessee.

(b) Land by legal description.

(c) A description of possessory interests sufficient to identify them.

(d) Personal property. A failure to enumerate personal property in detail does not invalidate the assessment.

(e) The cash value of real estate, except improvements.

(f) The cash value of improvements on the real estate.

(g) The cash value of improvements assessed to any person other than the owner of the land.

(h) The cash value of possessory interests.

(i) The cash value of personal property, other than intangibles.

(j) The revenue district in which each piece of property assessed is situated.

(k) The total taxable value of all property assessed, exclusive of intangibles.

(l) The actual value of solvent credits, after legal deductions for debts.

(m) Any other things required by the board.

Section 607. Land and improvements thereon shall be separately assessed.

2. Pertinent Provisions of the California Constitution and Statutes Relating to Powers and Duties of a County Board of Equalization.

ARTICLE XIII, SECTION 9, CALIFORNIA CONSTITUTION.

. . . The boards of supervisors of the several counties of the State shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation; provided such state and county boards of equalization are hereby authorized and empowered, under such rules of notice as the county boards may prescribe as to county assessments, and under such rules of notice as the state board may prescribe as to the action of the state board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in said roll; . . .

DIV. 1, PART 3, CHAP. 1 OF CALIFORNIA REVENUE AND TAXATION CODE ENTITLED "EQUALIZATION BY COUNTY BOARD OF EQUALIZATION."

Section 1611. After five days succeeding the time when notice of the date when the matter will be investigated is sent by the clerk of the county board to all persons interested, the county board may direct the assessor to:

(a) Assess any taxable property other than State assessed property that has escaped assessment.

(b) Change the amount, number, quantity, or description of property on the local roll.

(c) Make and enter new assessments, at the same time canceling previous entries, when any assessment made by him is deemed by the county board so incomplete as to render doubtful the collection of the tax.

3. Pertinent Provisions of California Statutes Relating to Payment of Local Taxes Under Protest and Terms of Judgment in Tax Recovery Actions.

DIV. 1, PART 9, CHAP. 5, ART. 2 OF CALIFORNIA REVENUE AND TAXATION CODE ENTITLED "PAYMENT UNDER PROTEST AND SUIT TO RECOVER."

Section 5136. After taxes are payable, any property owner may pay the taxes on his property under protest. A payment under protest is not a voluntary payment.

Section 5137. The protest shall be in writing, specifying:

(a) Whether the whole assessment is claimed to be void or, if only a part, what portion.

(b) The grounds on which the claim is founded.

Section 5137.5. The written protest shall be numbered by the tax collector and filed in his office and the fact of

such protest and the number thereof shall be marked on the roll or delinquent roll, opposite the tax to which the payment relates.

Section 5138. Within six months after the payment, an action may be brought against a county or a city in the superior court to recover the taxes paid under protest.

If all or any portion of the taxes paid under protest and sought to be recovered were collected by officers of the county for a city, an action must be brought against the city for the recovery of such taxes and judgment must be sought against the city. Where actions are brought against both a county and a city such actions may be joined in one complaint.

Any city for which county officers collect taxes may provide for the defense by counsel for the county of actions brought against the city under this article, in which event it shall be the duty of such counsel to defend such actions, or the city may provide that such actions shall be defended by its own counsel.

Section 5139. The action may be brought only:

(a) As to portion of the assessment claimed to be void.

(b) On the grounds specified in the protest.

(c) By the owner, his guardian, executor, or administrator.

Section 5140. On payment of a judgment against the county in an action under this article, any part of the tax recovered which was paid by the county treasurer to the State Treasurer is an amount due the county from the State and shall be deducted in the next settlement had by the county with the Controller.

Section 5141. If the court finds that the assessment complained of is void in whole or in part, it shall render judgment for the plaintiff for the amount of the taxes paid on so much of the assessment as is found to be void. In such event but only where taxes are paid after the effective date of this act, the plaintiff is entitled to interest on the taxes for which recovery is allowed at the rate of 5 per centum per annum from the date of payment under protest to the date of entry of judgment, and such accrued interest shall be included in the judgment. The taxes paid on so much of the assessment as is not found to be void shall constitute valid taxes which, if paid after delinquency, shall carry penalties, interest and costs.

Section 5142. Where the taxes sought to be recovered have been paid after delinquency, the amount of penalties, interest or costs recoverable in actions brought under this article shall be computed only on the taxes recovered.

Section 5143. As used in this article, "tax" or "taxes" includes penalties, interests and costs.

4. Pertinent Provisions of California Statutes Relating to Reassessment Proceedings.

DIV. 1, PART 9, ART. 3 OF CALIFORNIA REVENUE AND TAXATION CODE ENTITLED "ENFORCEMENT OF TAXATION AFTER ERRONEOUS PROCEEDINGS."

Section 4946. All or any portion of any uncollected tax, penalty, or costs, heretofore or hereafter levied, may on satisfactory proof submitted by the tax collector be canceled by the auditor on order of the board of supervisors with the written consent of the district attorney upon a showing that the collection of the delinquent tax cannot be enforced because of any errors in description, assess-

ment, equalization, levy, or any other proceeding. If all or any portion of the property was taxable for the year or years for which the cancellation is made, the clerk shall send a notice to the last assessee of the property respecting the cancellation. A similar notice shall be sent to the last assessee, except that the grounds of cancellation need not be stated, in the event that any tax, penalty or costs, or any portion thereof, is ordered canceled or held void or ordered refunded by a final judgment of a court of competent jurisdiction.

Section 4947. The notice shall state:

(a) The grounds of cancellation;

(b) That collection of the tax for the year for which cancellation was made will be enforced unless cause is shown why such action should not be taken;

(c) That the assessee may demand a hearing by the board of supervisors within ten days after the notice is sent. If demanded, the board of supervisors shall set a time for the hearing and its decision is final as to whether or not collection of the tax should be enforced. If any portion of the property was taxable for the year for which cancellation is made, the board of supervisors shall order collection of the corrected tax for the year for which cancellation was made.

Section 4948. If the board of supervisors orders that collection of the tax should be enforced, the assessor shall assess the property at its value on the lien date of the year for which cancellation was made.

The property shall be entered on the roll prepared or being prepared in the assessment year when the cancellation is made. The entry shall be followed with "Taxes

canceled for year 19.... and collection ordered enforced by Board of Supervisors ..... 19....."

The amount charged against the property on the roll on which it is entered shall be the corrected tax for the year for which the cancellation was made. No penalties or other charges shall be charged on this assessment except those which may attach to other property assessed for the year in which this property is placed on the roll. If the tax rate for the year for which the cancellation is made has not been held invalid by a court, the tax rate to be applied shall be the rate fixed for such year. If the tax rate or any portion of it has been held invalid by a final judgment of the court, the corrected tax shall be determined by the auditor by applying all such judgments in the manner prescribed by the Controller.

Any revenue received on this assessment for the year for which cancellation is made shall be treated like revenue received from delinquent taxes for such year.

The collection of the tax shall be enforced in the same manner as the tax on other property on the roll on which it is entered.

5. Pertinent Provisions of the California Constitution and Statutes Relating to Exemption From Local Taxation of Personal Property of Banks and Taxation of Bank Income at a Higher Rate Because of Such Exemption.

ARTICLE XIII, SECTION 16, CALIFORNIA CONSTITUTION.

1. (a) Banks, including national banking associations, located within the limits of this State, shall annually pay to the State a tax according to or measured by their net income, which shall be in lieu of all other taxes and licenses, state, county and municipal, upon such banks, or the shares thereof, except taxes upon their real property, at the rate to be provided by law.

(b) The Legislature may provide by law for any other form of taxation now or hereafter permitted by the Congress of the United States respecting national banking associations; provided, that such form of taxation shall apply to all banks located within the limits of this State.

SECTON 4a, CALIFORNIA BANK AND CORPORATION FRANCHISE TAX ACT (California Statutes 1933, page 871, as amended).

Section 4a. Rate of tax on national banking associations and other banks and financial corporations. The rate of tax on National banking associations and other banks and financial corporations mentioned in Sections 1, 2, and 4 of this act, shall be a percentage equal to the percentage of the total amount of net income, allocable to this State, of every corporation taxable under subdivision (3) of Section 4 of this act, other than public utilities as defined in the Public Utilities Act, for the next preceding calendar year or fiscal years ended during such calendar year, required to be paid to this State as franchise taxes according to or measured by such net income, and required to be paid to this State or its political subdivisions by such corporations as personal property taxes during the preceding calendar year or fiscal years ended in such calendar year; provided, however, that said rate of tax shall not exceed 8 percentum. The percentage of the net income of every corporation taxable under subdivision (3) of Section 4 of this act, other than public utilties as defined in the Public Utilities Act, required to be paid to this State or its political subdivisions in personal property taxes shall be determined by ascertaining the ratio which the total amount of such personal property taxes, less 4 percentum thereof, bears to the total amount of net income of such

corporation, allocable to California, increased by the amount of such personal property taxes; provided, however, that if any such corporation sustains a net loss allocable to California the personal property taxes required to be paid by such corporation to this State or its political subdivisions during the preceding calendar year or fiscal years ended during such calendar year shall be considered for the purpose of determining such ratio only to the extent which such personal property taxes exceed such net loss allocable to California.

The commissioner, after public hearing and opportunity given to examine the data on which his determination is based, shall determine not later than the thirty-first day of December of each year the average percentage of net income above specified, and, within thirty days after his determination, shall mail notice of his determination and the amount of tax payable on the basis of such determination to all banks and financial corporations affected thereby, which are then classified on his records as banks or financial corporations, but such determination shall not be considered a deficiency assessment within the meaning of Section 25 hereof. The data gathered by the commissioner in determining the rate, referred to herein, shall be made available to the taxpayers affected by such determination at the time and in the manner prescribed by regulations adopted by the commissioner.

If it be judicially determined that the rate of tax on any bank or corporation is higher than is authorized by law such bank or corporation shall be relieved of liability for any tax imposed by this act only to the extent of the excess beyond that legally authorized.

APPENDIX B.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT AS TO GROUNDS 3-6, INCLUSIVE.

5. So Long as a State Generally Classifies and Taxes Fixtures as Personal Property, It Has No Power to Classify and Tax National Bank Fixtures as "Real Property"; Taxes so Levied in Order to Evade Restrictions of R. S. 5219 Constitute "Discrimination."

National banks are agencies of the United States, created under its laws to promote its fiscal policies. They may be taxed by states only in strict conformity with the consent of Congress. *Des Moines National Bank v. Fairweather,* 263 U. S. 103, 106; *First National Bank v. Anderson,* 269 U. S. 341, 347; *Owensboro National Bank v. Owensboro,* 173 U. S. 664, 667-669. As to tangible property, this congressional consent is found only in paragraph 3 of R. S. 5219. No consent is given thereby for states to tax *personal* property. *Owensboro National Bank v. Owensboro, supra; Rosenblatt v. Johnston,* 104 U. S. 462, 463.

Congressional consent, thereunder, to taxation of national bank-owned "real property" is limited to taxes thereon "to the same extent, according to its value, as other real property is taxed." This phase, or slight variant thereof, has been incorporated by Congress in substantially all provisions permitting limited state taxation of property of various federal agencies.[5] Its importance is not restricted to petitioners or to national banks generally.

A state, for tax purposes, may define for itself what constitutes "real property" and such definition will apply

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[5]Reconstruction Finance Corporation, 15 U. S. C. 607 (c. 334, §5, 62 Stat. 265);
Commodity Credit Corporation, 15 U. S. C. 713a—5 (c. 44, §5, 52 Stat. 108);
Federal Credit Union, 12 U. S. 1768 (c. 3, §4, 51 Stat. 4);
Federal Farm Mortgage Corporation 12 U. S. C. 1020-f (c. 33, 48 Stat. 360);
Federal Home Loan Bank, 12 U. S. C. 1433 (c. 150, §8, 49 Stat. 295);
Federal Reserve Bank, 12 U. S. C. 531 (c. 101, §1, 40 Stat. 1314);

to and authorize state taxation under the federal statute as "real property." *Reconstruction Finance Corp. v. Beaver County,* 328 U. S. 204, 210. Such state definition must, however, "not effect a discrimination against the Government or patently run counter to the terms of the Act." (*Ibid.*)

But "discrimination" may also result from the manner in which a statute is applied. *Iowa-Des Moines National Bank v. Bennett,* 284 U. S. 239, 244-45; *Montana National Bank v. Yellowstone County,* 276 U. S. 499, 504. Elimination by *administrative* definition of all other fixtures from the terms of the uniform California statute, with consequent classification and taxation, if at all, as personal property, is as inharmonious with the Congressional consent as would be a statute to the same effect. Compare *Hamilton National Bank v. District of Columbia,* 156 F. (2d) 843, 846. (C. A. D. C.); *Ibid.* (Second Appeal) 176 F. (2d) 624, 630, certiorari denied 338 U. S. 891.

The trial court held that, if national bank fixtures had received the *general* classification, they would have been exempt from taxation under Section 5219 [R. 57]. Factually such was conceded by the State Supreme Court [R. 128]. This finding should have determined the controversy in favor of petitioners. The State Supreme Court, however, held that this would give national bank fixtures an "unwarranted exemption" [R. 133]. But power of Cali-

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Home Owners Loan Corporation, 12 U. S. C. 1463-c (c. 621, 56 Stat. 986),

Federal Deposit Insurance Corporation, 12 U. S. C. 264-p (c. 62, §1, 57 Stat. 65);

Federal Savings and Loan Insurance Corporation, 12 U. S. C. 1725-e (c. 150, §22, 49 Stat. 298);

Production Credit Association, 12 U. S. C. 1138-c (c. 98, §63, 48 Stat. 267).

Additionally by 1947 enactment Congress has employed the phrase "to the same extent" as limiting the authority to levy on governmental transactions many forms of state taxation of an excise character. 4 U. S. C. 104-106.

fornia to tax national bank fixtures does not exist because, under statute law or otherwise, they are "real property." If a State fails to tax land and buildings owned by state-chartered banks, it cannot under R. S. 5219 tax land and buildings of a national bank. *Covington City National Bank v. City of Covington,* 21 Fed. 484, 487. (Cir. Ct. D. Ky.) The power flows only from compliance with conditions expressed in the phrase "to the same extent, according to its value, as other real property is taxed."

These words in tax statutes have long been construed to mean "in the same manner." *People v. Feitner,* 167 N. Y. 1, 8; 60 N. E. 265, 268. On analogous situation the Court of Appeals for the District of Columbia in the second appeal in *Hamilton National Bank v. District of Columbia, supra,* p. 630, said:

> "So long as the taxing authorities of the District of Columbia classify as 'incorporated savings banks' the state-chartered commercial banking institutions which have interest-bearing savings deposits, and impose upon them the form of taxation set up in §1703, the national banks in the District which have interest-bearing savings deposits must be classified and taxed in the same manner." (Cert. denied, 338 U. S. 891.)

Likewise on identical facts with this proceeding, was the decision of the Oregon Supreme Court in *First National Bank of Portland v. Marion County,* 169 Ore. 595, 613-616; 130 P. (2d) 9, 16-17. It held taxes levied upon national bank fixtures assessed as real property to be "void" when all similar fixtures had been assessed as personal property.[6]

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[6]The conclusion of the Oregon Court was stated as follows (p. 16):

> "If trade fixtures are classified as personal property for the purpose of taxation, they must be taxed, if at all, as personal property, and not as realty."

Respondents' only power to tax national bank "real property" was thus *on condition* that real property of others be taxed "in the same manner" including classification thereof as real property. Congressional permission to tax the national bank fixtures involved herein was transgressed when the Congressional condition was not fulfilled. The "discrimination" in classification was nonetheless action by the state although the county assessor in failing to give the required "real property" classification to all other fixtures acted contrary to the law of the state. *Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239, 244-45; *Montana National Bank v. Yellowstone County*, 276 U. S. 504, 505. The assessor's failure to comply with the terms of the Congressional consent under R. S. 5219 rendered the national bank fixtures and the buildings with which they had been indivisibly assessed during the period "exempt" from state taxation, until by proper reassessment proceedings, uniform in character with assessments made of similar property owned by others, petitioner's buildings were brought within the terms of the Congressional authority.

6. So Long as a State Classifies and Taxes Fixtures, if at All, as Personal Property, the Equal Protection Clause and R. S. 5219 Require Like Treatment of National Bank Fixtures.

The Equal Protection clause protects the taxpayer from State action which selects him out for discriminatory treatment. It guarantees him "the right to equal treatment." *Hillsborough Township v. Cromwell*, 326 U. S. 620, 623; *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 445-447; *Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239, 245-246.

The right to equal treatment includes the right to similar "classification." Compare *Hamilton National Bank v. District of Columbia*, 176 F. (2d) 624, 630; *ibid.* (first appeal) 156 F. (2d) 843, 846. Conclusion by the State Supreme Court that had national bank fixtures been given

the same classification applied to other fixtures, they would have been "exempt" [R. 128] required further declaration that petitioners' taxes were prohibited by the Equal Protection clause and that national bank fixtures were "exempt" from local taxation.

In reversing the trial court which so held [R. 57] the California Supreme Court concluded that arbitrary withholding of a benefit granted others (*i. e.*, classification as personal property) is not within the purview of the Equal Protection clause [R. 135]. Decisions of this Court have long held that its prohibition is aimed at "undue favor and individual or class privilege" as well as "oppression." *Truax v. Corrigan,* 257 U. S. 312, 332-333.

While recognizing that equal treatment of national bank fixtures would have required them to be treated as "exempt personal property," the State Supreme Court negatived such result upon the ground that the California statute as construed by it in *Trabue-Pittman Corp. v. County of Los Angeles,* 29 C. (2d) 385, 393; 175 P. (2d) 512, 518, declared them to be "real property" [R. 130]. Under the Equal Protection clause the right to equal treatment is paramount over requirement of statute, even though such results in exemption from state taxation. *Hillsborough Township v. Cromwell, supra; Montana National Bank v. Yellowstone County,* 276 U. S. 499, 503-504.

7. "Discrimination" in Violation of R. S. 5219 and the Equal Protection Clause Is Not Excused by Levy of Personal Property Taxes on Other Misclassified Fixtures.

This Court has long held in cases involving power of a State to tax property of a federal agency that mere "equivalency" in amount between an unauthorized tax and a valid tax or that the unlawful tax represented, no more than "what might have been done," will not bring

taxes, in fact levied beyond the bounds of Congressional consent, within the authority of R. S. 5219. *Owensboro National Bank v. Owensboro,* 173 U. S. 664, 683; *First National Bank of Gulfport v. Adams,* 258 U. S. ~~326~~ 362 365. The question is one of power, not of amount. Lack of power cannot be justified by claimed fairness in imposing a similar tax on other property admittedly subject to state taxation. Compare *Freeman v. Hewit,* 329 U. S. 249, 254; *Fairbank v. United States,* 181 U. S. 283, 291.

To the contrary, the State Supreme Court concluded that discriminatory tax classification was not prohibited under R. S. 5219 so far as general county and city taxes were concerned, because "misclassified" fixtures of others were subjected to similar taxes. For such holding it erroneously relied upon decisions of this Court in *Tradesmen's National Bank v. Oklahoma Tax Commission,* 309 U. S. 560, and *Amoskeag Savings Bank v. Purdy,* 231 U. S. 373. These decisions were not concerned with power of a State to tax national bank real property nor with the provisions of paragraph 3. They considered state taxes levied on national bank shares and on national bank income authorized, if at all, by paragraph 1(b) or 1(c). Conditions placed upon Congressional consent under these paragraphs are far different from that of paragraph 3, depending not upon similarity of treatment, but upon the "rate" of tax levied on other competing "moneyed capital" or other types of corporate income. In the cited decisions this Court has held that the word "rate" so used refers to *all* taxes levied on competing "moneyed capital" or other corporate income irrespective of the number of other taxes involved or the manner in which the other taxes were levied. Such construction of a different form of Congressional consent is neither applicable nor persuasive here.

Also "discrimination" prohibited by the Equal Protection clause applies to withholding an "undue favor and individual or class privilege" granted others, as well as to direct unequal "oppression." *Truax v. Corrigan,* 257 U. S. 312, 323-333.

9. In Withholding From Petitioners Full Recovery of Their Invalid Taxes Contrary to Decisions of This Court and as Required by Valid State Statute, the Judgment of the California Supreme Court Was a Denial of Due Process of Law.

A declaration by a court of last resort, as in this case, that a taxpayer has been wronged in violation of Federal Statute or Constitution requires more than such admission of wrongdoing. A taxpayer's constitutional right includes the right to judgment by the state court refunding *in full* the invalidly exacted taxes. *Montana National Bank v. Yellowstone County,* 276 U. S. 499, 504-505; *Iowa-Des Moines National Bank v. Bennett,* 284 U. S. 239, 247.

By statute, California recognizes this duty [R. & T. C. 5136-5143, App. A pp. 3-5]. Thereunder, a wronged taxpayer is entitled to pay a tax, invalid because of "void assessment," under protest and to sue and recover judgment refunding him *all* taxes based on such void assessment. In compliance with this statute the trial court entered judgments refunding petitioners *all* taxes paid on their invalid building assessments [R. 64-68] subject to respondents' later right to reassess the buildings constitutionally in accordance with the method applied uniformly to other buildings. [R. & T. C. 4946-4948, App. A, pp. 5-7.]

The California Supreme Court, in reversing the trial court and refunding to petitioners only special assessment taxes, intentionally and deliberately denied to them the relief expressly provided by state statute in such cases and thereby left in the public treasury the major portion of the invalid taxes previously exacted. Moreover, it never questioned the validity of the state statute it ignored nor its clear and unambiguous meaning.

These suits were conducted pursuant to specific statutory procedure [R. & T. C. 5136-5143, App. A pp. 3-5]. For a taxpayer to prevail thereunder the trial court *must*

find "that the *assessment* complained of is *void* in whole or in part" [R. & T. C. 5141, App. A p. 5]. The statute prescribes that the resulting judgment shall be for "the amount of taxes paid on *so much* of the *assessment* as is found to be *void*" [R. & T. C. 5141, App. A p. 5].

The trial court found that, under the circumstances of this case, assessment of national bank fixtures as "real property" was prohibited by both R. S. 5219 [R. 60] and the Equal Protection clause [R. 60]. Because the fixture portions of the assessments were judicially indivisible from assessments on the remainder of petitioners' buildings, it held them *entirely* "void" [R. 60-61]. Such latter determination, upon the facts of this proceeding, was required by decisions of this Court. *Santa Clara County v. Southern P. R. Co.*, 118 U. S. 394, 416; *California v. Central R. R. Co.*, 127 U. S. 1, 45. The judgment of the trial court [R. 64-68] for recovery of all taxes "paid" on their building assessments was the *only* judgment authorized [R. & T. C. 5141, App. A p. 5].

The State Supreme Court approved all factual findings made by the trial court [R. 128]; it recognized that equal treatment required classification of bank fixtures as personal property with consequent exemption from local taxation [R. 129]; and it found under California law that "if the taxing authorities 'resort to arbitrary methods varying from those employed in assessing other property of like character and situation and resulting in the imposition designedly of an illegal burden on the part of the complainant'" the resulting assessments would be "invalidated by the courts" [R. 131].

Without consideration of facts so found or its own declaration as to applicable law, the State Supreme Court ignored the invalidity of the *assessments* and regarded the case as one involving only invalidity of subsequently imposed *taxes*. It referred to taxes on each building as

being in part "valid" and in part "invalid" [R. 137]. But there was only *one* assessment of petitioner's building regardless of the number or kinds of taxes extended against it [R. 19]. In California there cannot be a valid tax for any purpose levied on a *void* assessment. Cal. Const. Art. XIII, Sec. 10 (App. A p. 1); *People v. Hastings*, 29 Cal. 449, 451; *Universal Consolidated Oil Co. v. Byram*, 25 Cal. 2d 353, 361. In ordering the trial court to refund only special assessment taxes the State Supreme Court ordered a judgment in defiance of statute.

The statute places the duty upon the court to determine the extent of the "void" assessment [R. & T. C. 5141, App. A p. 5]. The trial court held it could not divide building assessments between fixtures and the remainder of the buildings [R. 49, 59]. The California Supreme Court approved this conclusion [R. 137]. Accordingly, in this case, the trial court held the assessment to be wholly void [R. 59-60]. But, in the *Simms Case*, the State Supreme Court ordered the trial court, in disregard of statute, to refer such assessments for division to the county board of equalization, a body entirely unauthorized by state statute or Constitution to make such separation. Cal. Const. Art. XIII, Sec. 9 (App. A p. 1); R. & T. C. 1611 (App. A p. 3).

The State Supreme Court excused this disregard of the statute-required judgment and the consequent denial to petitioners of their vested rights thereto upon the ground, for the first time so declared, of a *court* "policy" that to "require defendants to refund the valid portion of the special district taxes attributable to the value of plaintiff's buildings and to pay interest thereon" "would be contrary to the policy that the public should not be deprived of revenue necessary for the performance of governmental functions" [R. 137]. The California Supreme Court thus deliberately arrogated to itself, in violation of petitioners' vested Federal rights thereunder,

authority to override a valid statute an act which this Court has uniformly held not to be within the permissible limits of the judicial function. *Osborn v. Ozlin,* 310 U. S. 53, 66.

This Court, by Mr. Justice Brandeis in *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 679-680, has said:

> ". . . If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious . . . The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid . . . state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government."

Petitioners specifically raised their additional injury under the Due Process clause on petition for rehearing [R. 150, 156, 234-242]. The California Supreme Court denied such petition [R. 177] without opinion or modification of its former judgment. Petitioner's additional Federal question was timely since raised at its first opportunity. *Missouri ex rel Missouri Co. v. Gehner,* 281 U. S. 313, 319-320; *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 678.